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No. 94-1809

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

LAWRENCE EPSTEIN, *et al.*,

Respondents.

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD. and MATSUSHITA HOLDING CORPORATION,

Petitioners,

v.

WALTER MINTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINTON OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OPPOSITION OF WALTER MINTON TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Walter Minton respectfully submits the following opposition to the Petition of Matsushita Electric Industrial Co., Ltd. and Matsushita Holding Corporation ("Matsushita") for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in these cases.

ADDITIONAL PERTINENT STATUTORY AND REGULATORY PROVISIONS

Section 14(d)(7) of the Williams Act (15 U.S.C. § 78n(d)(7)) provides:

> Where any person varies the terms of a tender offer or request or invitation for tenders before the expiration thereof by increasing the consideration offered to holders of such securities, such person shall pay the increased consideration to each security holder whose securities are taken up and paid for pursuant to the tender offer or request for invitation for tenders whether or not such securities have been taken up by such person before the variation of the tender offer or request or invitation.

SEC Rule 14d-10(c)(1) provides in pertinent part:

> Paragraph (a)(2) of this section shall not prohibit the offer of more than one type of consideration in a tender offer, *Provided*, That: (1) Security holders are afforded equal right to elect among each of the types of consideration offered[.]

SEC Rule 14d-2 (17 CFR section 240.14d-2) provides in pertinent part:

> (a) A tender offer shall commence for the purposes of Section 14(d) of the Act and the Rules at 12:01 a.m. on the date when the first of the following events occurred:
>
> ...
>
> (5) The tender offer is first published or sent or given to security holders by the bidder by any means not otherwise referred to [in the preceding paragraphs].
>
> (b) *Public Announcement.* A public announcement by a bidder through a press release, newspaper advertisement or public statement which includes the information in paragraph (c) of this section with respect to the tender offer in which the consideration consists solely of cash and/or securities exempt from registration under section 3 of the Securities Act of 1933 shall be deemed to constitute the commencement of a tender offer under paragraph (a)(5) of this section
>
> ...
>
> (ii) Notwithstanding paragraph (b)(2)(i) of this section, section 14(d)(7) of the Act shall be deemed to apply to such tender offer from the date of such public announcement.

QUESTIONS PRESENTED

Section 14(d)(7) of the Williams Act (15 U.S.C. § 78n(d)(7)) and SEC Rule 14d-10 promulgated thereunder embody the "all holders, best price" rules of the securities laws and require a tender offeror to treat all target shareholders equally.

Matsushita has filed this petition because the court below held that Matsushita, as part of its 1990 acquisition of MCA Inc., violated section 14(d)(7) and Rule 14d-10 by giving Lew Wasserman, MCA's chairman and owner of 5 million shares of its

common stock, a special stock payment designed to save him over $100 million in income taxes, and will have violated these rules if a jury finds that Sidney Sheinberg, MCA's President, received a $21 million premium for his stock.

Matsushita's Petition presents the following issues:

1. Whether the Ninth Circuit was correct in applying the implied private right analysis approved by this Court and concluding, with the Second and Third Circuit Courts of Appeals, that there is a private right of action for the violation of section 14(d)(7) and Rule 14d-10.

2. Whether the Ninth Circuit was correct in applying a substantive analysis in determining that the Wasserman transaction was part of Matsushita's tender offer and therefore subject to section 14(d)(7) and Rule 14d-10 and in rejecting Matsushita's claim that it can avoid the proscriptions of section 14(d)(7) and Rule 14d-10, even though the Wasserman transaction was entered into after the tender offer commenced, merely by labeling the Wasserman transaction as "private."

3. Whether the Ninth Circuit properly refused to give preclusive effect to a collusive settlement agreement entered into in a dormant Delaware state court class action that purported to release the exclusively federal section 14(d)(7) and Rule 14d-10 claims, where the facts underlying such claims were not and could not be litigated in the state court action, and where a litigated judgment in the state court action would not have had any preclusive effect on such exclusively federal claims.

STATEMENT OF THE CASE

This case arises out of the acquisition of MCA Inc. in late 1990 by Matsushita Electric Industrial Co., Ltd. and its subsidiaries ("Matsushita") for consideration of over $6 billion.[1]

Under the formal terms of its tender offer, Matsushita offered $66 per share in cash to every shareholder except Lew Wasserman, the chairman and owner of approximately 5 million shares of MCA common stock. In return for Wasserman's backing of their tender offer, Matsushita entered into a special agreement with Wasserman, under the terms of which Wasserman exchanged his MCA stock for preferred stock in a Matsushita subsidiary (the "Wasserman transaction"). The Wasserman transaction was structured to be a tax-free transaction that would provide Wasserman with *at least* equivalent value for his shares and would also allow Wasserman to avoid ever paying over $113 million in income taxes.[2]

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[1] Matsushita Acquisition and Matsushita Holding are Delaware corporations formed by Matsushita Electric Industrial Co., Ltd., a Japanese corporation ("MEI"), for the purpose of making a tender offer for the common stock of MCA. The Merger Agreement between MEI and MCA provided that Matsushita Acquisition would make a cash tender offer for the outstanding shares of common stock of MCA and that thereafter Matsushita Acquisition would merge with and into MCA. Upon the completion of the tender offer, Matsushita Acquisition was merged with and into MCA. MCA continues as the surviving corporation and is a wholly-owned subsidiary of MEI. Thus, while pre-merger MCA is not in the case as an aider and abetter (see footnote 6, *infra)*, post-merger MCA is the successor-in-interest to the liabilities of the primary wrongdoer, Matsushita Acquisition.

[2]Wasserman's basis in his 4,953,927 shares of common stock was only 3¢ per share. (Matsushita Appendix (hereinafter "App.") 2a.) Thus, if he had received the $66 in cash per share that the other MCA shareholders received, he would have had a taxable gain of $326,810,564 ($65.97 basis per share * 4,953,927 shares). The maximum federal income tax rate for capital gains in 1990 was 28%. Wasserman lived in California, and in 1990, California's maximum income tax rate for capital gains was 9.3%. Taking into account the deductibility of state income taxes for federal income tax purposes, the combined effective income tax rate was 34.7%. Thus, had Wasserman received cash, he would have had to pay taxes of $113,403,266 ($326,810,564 gain * 34.7% tax rate).

Matsushita publicly announced its tender offer for MCA on the morning of November 26, 1990.[3] The Wasserman transaction was entered into at the earliest ***after*** 12:01 a.m. on November 26, 1990. (App. 12a.)

Matsushita has admitted that it did not offer the preferred stock to all holders of MCA common stock.

In their complaints, Minton, individually ("Minton"), and the Epstein Plaintiffs, as putative class representatives ("Epstein"), alleged that the Wasserman transaction violated section 14(d)(7) of the Williams Act, Rule 14d-10 promulgated thereunder, and Rule 10b-13 because Matsushita, through the Wasserman transaction, varied the tender offer by increasing the consideration offered to Wasserman without paying such increased consideration to the other shareholders.[4] After denying the Epstein Plaintiffs' motion for class certification, the district court entered summary judgment

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The preferred stock Wasserman received pays a dividend of 8.75% annually, is secured by letters of credit, and is redeemable upon the death of the earlier of Wasserman or his wife, and in no event earlier than five years from the date of the exchange. (App. 2a.)

It is undisputed that the transaction was designed to be a tax-free exchange of Wasserman's MCA stock under Internal Revenue Code § 351(a). (*Id.*) Since, upon the death of Wasserman or his wife, the basis of all their community property, including the Matsushita preferred stock, would "step up" to its fair market value (see Internal Revenue Code §§ 1014, 2032), ***if Wasserman holds his preferred stock until he or his wife dies, he can avoid paying over $113 million in income taxes.***

[3]Consolidated Clerk's Transcript, 177, page 5.

[4]Plaintiffs also contended that a $21 million payment made to Sidney Sheinberg, MCA's president and owner of 1,170,000 shares of MCA common stock, was in reality additional consideration paid to him in return for his promise to tender his stock.

in favor of Matsushita in both the Epstein Action and in the Minton Action.[5]

The Ninth Circuit reversed the dismissal of the section 14(d)(7) and Rule 14d-10 claims, holding that the Wasserman transaction violated Rule 14d-10 as a matter of law, and remanded on the question of damages. (App. 20a.) The court also ruled that the jury could find that the $21 million payment to Sheinberg was part of Matsushita's tender offer and therefore violated Rule 14d-10, and remanded on that issue. (App. 23a.)[6]

With respect to the class action issues, the court vacated the order denying the motion for certification and instructed the district court on remand to enter an order certifying the class. (App. 43a.) The court also rejected Matsushita's claim that an intervening settlement of a Delaware state court class action that purported to release the federal claims in this case barred the class action because the Delaware claims depended on different underlying facts than the federal claims.[7]

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[5]The district court had previously dismissed Plaintiffs' Rule 10b-13 claims on the grounds that there was no private right of action thereunder. The Ninth Circuit declined to consider this claim, reasoning that, on the facts of this case, any relief Plaintiffs could obtain under Rule 10b-13 was also available under Rule 14d-10. (App. 3a, fn. 5.)

[6]On the authority of this Court's decision in *Central Bank v. Interstate Bank*, 114 S.Ct. 1439 (1994), the Ninth Circuit affirmed the dismissal of the "aider and abetter" claims against the pre-merger MCA, Wasserman and Sheinberg. (App. 4a, fn. 7.)

[7] The court specifically declined to decide whether a state court may release exclusively federal claims in a class action settlement judgment when those claims depend on the same facts as state law claims before the court. (App. 40a, fn. 34.)

REASONS FOR DENYING THE PETITION

1. ***There is no final judgment***. This case does not involve a final judgment, but an interlocutory ruling by the Ninth Circuit. It is quite possible the future proceedings will result in the issues raised by Matsushita becoming moot. For example, Matsushita has always contended that the consideration Wasserman received pursuant to the Wasserman transaction was not worth more than the $66 in cash paid to the other shareholders. While Plaintiffs dispute this contention, this issue will ultimately be determined by a jury. If a jury agrees with Matsushita's contentions, then there will be no need for this Court to determine the issues Matsushita raises now.

2. ***The Wasserman Transaction Was a Unique Transaction***. Matsushita admits in its Petition that the Wasserman transaction "was intended to satisfy Mr. Wasserman's *unique* tax planning and estate need arising in part from his age (77 in 1990) and his extremely low basis in the MCA stock ($.03 per share)." (Petition, 4 (emphasis added).) The Ninth Circuit's finding that the Wasserman transaction was part of Matsushita's tender offer was necessarily based on the unique facts of the Wasserman transaction.[8] Thus, a review of such finding by this Court will not result in any needed clarification of principles applicable to normal tender offers.

3. ***Private Right of Action***. Although Matsushita requests this Court to determine whether there is a private right of action under Rule 14d-10, such determination is unnecessary because Matsushita cannot credibly dispute that there is a private right of action under section 14(d)(7). The Ninth Circuit's recognition of a private right of action under section 14(d)(7) is consistent with this Court's jurisprudence and with every Circuit Court that has specifically addressed the issue. Since Matsushita violated both Rule 14d-10 and section 14(d)(7), whether there is a private right of action

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[8]See App. 11a-13a and 18a-20a for discussion of Wasserman transaction.

under Rule 14d-10 in addition to section 14(d)(7) is essentially moot.

Moreover, contrary to Matsushita's contention, the court below did not "automatically" imply a private right of action for every rule adopted pursuant to section 14(d)(7). Indeed, in recognizing a private right of action under Rule 14d-10, the Court of Appeal cited its decision in *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530 (9th Cir. 1984), wherein it specifically adopted the two-step inquiry referred to by Matsushita in its Petition to determine whether there is an implied right of action under an agency rule. Thus, there is not a case where the Ninth Circuit is adopting a "new implied right of action test of unprecedented breadth." (Petition, 19.)

4. ***Construction of "Best Price" Rules***. Contrary to Matsushita's claim, the Ninth Circuit did not "expand" a statutorily-defined tender offer time period to include a transaction that occurred outside the tender offer period. (Petition, page i.) In fact, based on the stipulated facts, there is no question that the Wasserman transaction was entered into ***after*** the tender offer commenced. This finding is consistent with the Fourth Circuit's interpretation of Rule 14d-10 in *Kahn v. Virginia Retirement Systems*, 13 F.3d 110 (4th Cir. 1993) *cert. denied*, 114 S.Ct. 1834 (1994).

In addition, the Ninth Circuit's refusal to be bound by the label used by Matsushita and its adoption of a substantive analysis of the Wasserman transaction to determine whether it should be deemed part of Matsushita's tender offer for purposes of section 14(d)(7) and Rule 14d-10 is consistent with Second Circuit's decision in *Field v. Trump*, 850 F.2d 938, 942 (2d Cir. 1988) *cert. denied.*, 489 U.S. 1012 (1988). Following the analysis of the Second Circuit in *Field*, the court below properly held that a tender offeror should not be allowed to pay higher consideration to a favored shareholder through a transaction that was an integral part of, and entered into during, the formal tender offer, and avoid the "best price" rule of section 14(d)(7) and Rule 14d-10 merely by

structuring and labeling the discriminatory transaction as an ostensibly "private" transaction.

5. ***Class Action Issues***. The Court of Appeals' decision with respect to the class action issues is necessarily limited to the very unique facts of this case and will not create a conflict among the Circuits. Applying well-established rules of federal claim preclusion, the Court of Appeals properly prevented Matsushita and its state court accomplices from subverting the protection afforded to the shareholders of MCA by selling such claims for a few pennies per share in a settlement of a state court action that did not involve any facts common to the section 14(d)(7) and Rule 14d-10 claims. The Ninth Circuit's preclusion analysis is consistent with that of the First and Third Circuits, and Matsushita has cited no cases in which the application of the Ninth Circuit's reasoning would result in a different decision.

I. THIS IS AN APPEAL FROM AN INTERLOCUTORY DECISION, NOT A FINAL JUDGMENT, AND THE ISSUES PRESENTED ARISE BECAUSE OF THE UNIQUE FACTS OF THIS CASE.

The Ninth Circuit's decision is not a final judgment. The case was remanded to the district court, and the issues of the value of Wasserman's preferred stock and the Sheinberg payment must be tried to a jury. If Matsushita is successful on remand in convincing a jury that Wasserman did not receive more consideration for his stock than the other shareholders received and that the Sheinberg payment was really only an employment bonus, not a premium payment for his stock, Matsushita will have won, and a review of the issues raised by Matsushita before this Court will not be necessary. Even if Matsushita loses at trial, it will still have the opportunity to appeal the issues presented here to this Court.

Moreover, this case arose as a result of the Wasserman transaction, a transaction which Matsushita admits was "unique."[9]

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[9]Similarly, the Sheinberg payment was unique to Sheinberg.

A review of the Ninth Circuit's application of law to these unique facts will therefore not produce enduring legal principles.[10]

II. THERE IS NO NEED FOR THIS COURT TO DECIDE WHETHER THERE IS A PRIVATE RIGHT OF ACTION UNDER RULE 14d-10.

Matsushita does not seek review of the Ninth Circuit's holding that there is a private right of action for the violation of section 14(d)(7). Rather, Matsushita requests this Court to determine whether a private right of action exists for the violation of Rule 14d-10.[11] This Court need not make such determination, however, because Matsushita does not, and cannot credibly, dispute that there is a private right of action under section 14(d)(7). Indeed, the Ninth Circuit's recognition of a private right of action under section 14(d)(7) is consistent with the jurisprudence of this Court and with the decisions of every Circuit Court that has specifically addressed the issue. (See *Field v. Trump*, 850 F.2d 938, 946 (2d Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *Polaroid Corp. v. Disney*, 862 F.2d 957, 996 (3d Cir. 1988).)[12]

The court below applied the traditional four-factor test approved by this Court in *Cort v. Ash*, 422 U.S. 66 (1975), and, following

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[10] Although the issue of whether a private right of action exists under section 14(d)(7) and Rule 14d-10 is before this Court, there is no inter-Circuit conflict for this Court to resolve. In fact, as discussed in Section II, *infra*, every Circuit Court that has decided the issue has recognized that a private right exists for the violation of section 14(d)(7).

[11] Matsushita frames Question No. 2 of its "Questions Presented" as follows:

> 2. Whether a federal court can automatically imply a private right of action under an agency regulation, here Securities and Exchange Commission Rule 14d-10, on the sole ground that the enabling statute has been held to be privately enforceable. (Petition, i.)

[12] Although the issue was not specifically addressed by the Fourth Circuit in *Kahn vs. Virginia Retirement System*, 13 F.3d 110 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1834 (1994), by addressing the merits of the section 14(d)(7) claim, the court in *Kahn* implicitly recognized a private right of action.

the Second and Third Circuits, properly concluded that, in enacting section 14(d)(7), Congress intended to provide a damage remedy as a means of enforcing its command that every security holder who tenders his shares be paid any "increased consideration" offered to other shareholders. (App. 11a.) Simply put, the statutory language of section 14(d)(7) — that a bidder "shall pay the increased consideration" to a shareholder who was paid less than another shareholder — is more than adequate to demonstrate congressional intent to create a private right of action.

Since liability in this case is clear under section 14(d)(7), whether a private right of action exists under Rule 14d-10 in addition to section 14(d)(7) is essentially moot, and there is no need for this Court to address the issue.[13]

Realizing this, Matsushita attempts to create an issue where none exists by erroneously contending that the court below rejected the two-step inquiry adopted by the Sixth and Third Circuits in determining whether private rights of action exist under agency Rules. (Petition, page 19.) In fact, the court below cited its opinion in *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530 (9th Cir. 1984) as support for its conclusion that there is a private right of action under Rule 14d-10. (App. 5a, fn. 8.) Since the two-part test recited in *Robertson* is essentially identical to that enunciated by the courts in *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992), *Ashbrook v. Block*, 917 F.2d 918 (6th Cir. 1990), and *Angelastro v. Prudential-Bache Sec. Inc.*, 764 F.2d 939 (3d Cir. 1985), *cert. denied*, 474 U.S. 935 (1985), Matsushita's attempt to manufacture a reviewable issue should be rejected by this Court.[14]

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[13] Since the Wasserman transaction was part of Matsushita's tender offer, it is clear that Matsushita violated section 14(d)(7) by "varying" the terms of the tender offer by offering increased consideration to Wasserman without paying such increased consideration to the other shareholders.

[14] In *Robertson*, the Ninth Circuit adopted the following two-step test in determining whether a private right of action exists for the violation of an agency rule:

III. THE NINTH CIRCUIT'S SUBSTANTIVE ANALYSIS OF SECTION 14(d)(7) AND RULE 14d-10 IS CONSISTENT WITH THE DECISIONS OF THE SECOND AND FOURTH CIRCUITS.

A. The Ninth Circuit Was Correct in Refusing to Be Bound by Matsushita's Self-serving Labels and Instead Applying a Substantive Analysis of the Wasserman Transaction in Determining Whether it Was Part of Matsushita's Tender Offer.

Matsushita contends that Rule 14d-10 is designed to operate only during a "clearly-defined tender offer period," and that the Wasserman transaction cannot be deemed subject to Rule 14d-10 because the consideration paid thereunder was paid after the expiration of the time the other shareholders were required to tender their shares. The Ninth Circuit correctly rejected this rigid "stop-watch" analysis, ruling that the proper inquiry was whether the Wasserman transaction should be deemed part of the tender offer. As the Ninth Circuit observed:

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(1) whether Congress delegated authority to establish rules implying a private right of action; and (2) whether the rule in question was drafted such that this private right of action may legitimately be implied. *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 679 (9th Cir. 1980) (stock exchange rules.) (*Robertson, supra*, 749 F.2d at 534.)

> Whether the Wasserman transaction violated Rule 14d-10 depends upon whether Wasserman received greater consideration than other MCA shareholders "during such tender offer," Rule 14d-10(a)(2), or whether he received a type of consideration not offered to other MCA shareholders "in a tender offer." Rule 14d-10(c).[15]

This analysis is appropriate because, while both section 14(d)(7) and Rule 14d-10 speak in terms of a "tender offer," the term "tender offer," as used in the federal securities laws, has never been interpreted to denote a rigid period of time.[16] Thus, the Ninth Circuit properly rejected Matsushita's claim that the Wasserman transaction cannot be deemed a part of the tender offer merely because it was labeled a private exchange of stock and was structured to close after the time for shareholders to tender their shares expired. Rather, the court below focused its inquiry on whether the transaction in question "was an integral part of Matsushita's tender offer."[17]

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[15]In addition, section 14(d)(7) speaks in terms of "varying" the terms of a tender offer "before the expiration thereof by increasing the consideration offered to holders of such securities." Surely Matsushita would not have this Court conclude that Congress intended to allow tender offerors to avoid their substantive obligations under section 14(d)(7) merely by structuring as an ostensibly "private" transaction one that is inseparably integrated with a formal tender offer and that pays more consideration to some target shareholders.

[16]As the court below observed:

> On the contrary, in order to prevent bidders from circumventing the Williams Act's requirements, Congress, the SEC, and the courts have steadfastly refused to give the term a fixed definition. Instead, we have held that "[t]o serve the purposes of the Williams Act, there is a need for flexibility in fashioning a definition of a tender offer." *SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 950 (9th Cir. 1985). (App. 15a.)

[17](App. 17a.) The Ninth Circuit observed:

> If an ostensibly private agreement that pays a particular shareholder a sum greater than the tender price is deemed a part of the tender offer, the tender offer does not end, by definition, until that agreement is

The Ninth Circuit's substantive analysis of the Wasserman transaction is consistent with the Second Circuit's decision in *Field v. Trump, supra*, in which the court applied the same substantive analysis and found that an ostensibly "private" transaction was subject to section 14(d)(7) and Rule 14d-10. In *Field v. Trump*, the defendants commenced a tender offer at a price of $22.50 per share for shares of defendant Pay'n Save Corporation. Shortly after the market closed on the fourth business day after the announcement of the tender offer, the defendants "withdrew" the offer in order to arrange a purchase of a bloc of shares from certain dissident directors of Pay'n Save. Later that night, after acquiring an option to purchase the dissidents' shares, the defendants announced a "new" tender offer at $23.50 per share. When the price of the option was taken into account along with the payment for "fees and expenses" made to the dissident directors pursuant to the option agreement, the dissident directors received $25.00 per share, a $1.50 premium over the price paid to the other tendering shareholders.

A shareholder subsequently filed a class action against the offerors, the target company and its officers and directors, alleging that the option agreement between the offerors and the dissident directors violated section 14(d)(7) of the Williams Act and SEC Rule 10b-13, *inter alia*.

The district court dismissed the complaint under Rule 12(b)(1) and 12(b)(6), holding that the plaintiff did not state a claim under Section 14(d)(7) because the offerors had announced an effective withdrawal of their tender offer before they entered into the option

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performed. Performance of the agreement, including payment of the shareholder, will therefore take place "during the tender offer," in violation of Rule 14d-10(a)(2). Similarly, if one shareholder is offered a different type of consideration than other shareholders in a transaction that is determined to be a part of the tender offer, the bidder has offered more than one type of consideration "in a tender offer" without affording each shareholder the right to choose the package she prefers, in violation of Rule 14d-10(c)(1). (App. 17a, fn. 19.)

agreement with the dissident directors. The plaintiff appealed, and the Second Circuit Court of Appeal reversed, holding that the transaction constituted a violation of section 14(d)(7) of the Williams Act.

The court began its analysis by observing that discriminatory premium payments were illegal:

> No party disputes the proposition that payment of a premium to one shareholder and not others during a tender offer is illegal. (*Id.*, 850 F.2d at 943.)

The court then focused on the more difficult issue of whether the purported withdrawal of the tender offer effectively ended the first tender offer so that the agreement to pay a premium to the dissident shareholders pursuant to the option agreement, which had been entered into after the "first" offer and before the "second" offer, was not entered "during the tender offer."

Addressing this issue, the court endorsed a "functional test that scrutinizes such purchases in the context of various salient characteristics of tender offers and the purposes of the Williams Act," rather than simply "rubber-stamping the label used by the acquirer." (*Id.*, 850 F.2d at 944.)

After looking to the substance of the transaction in dispute, the Second Circuit concluded that the two tender offers were in reality one tender offer.[18] Concluding that the discriminatory purchase of

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[18]In determining whether a transaction is part of a tender offer, the *Field* court cited factors which the SEC has identified as relevant "[i]n establishing criteria to govern the integration of formally separate offerings." (*Id.*, 850 F.2d at 945.) Among these relevant factors were the following:

> (1) are the offerings part of a single financing;
>
> (2) do the offerings involve issuance of the same class of security;
>
> (3) are the offerings made at or about the same time? (*Id.*, 850 F.2d at 945 (quoting Section 3(a)(11) Exemption for Local Offerings, Securities Act Release No. 4434 (Dec. 6, 1961)).

The court in *Field* applied these factors to determine whether the purchase in dispute in that case was part of a tender offer, modifying the first factor by asking whether "the offers [are] part of a single plan of acquisition." (*Id.*, 850

the dissidents' shares through the option agreement was therefore made during the period of the tender offer, the court held that such transaction violated section 14(d)(7).

In *Field v. Trump*, it was clear that the additional consideration paid to the dissenting shareholders by the offeror was not paid through a formal modification of the tender offer. Although the "second" tender offer was for $23.50 per share, $1.00 more per share than the "first" tender offer, the $23.50 was offered to all shareholders. Thus, it was not the increased consideration paid pursuant to the express terms of the "second" tender offer that was the basis of the plaintiffs' claim. Rather, the basis of plaintiffs' claim in *Field* was the fact that only the dissenting shareholders received increased consideration for selling their shares to the offeror pursuant to the "option agreement," under the terms of which such shareholders effectively received an additional $1.50 per share above $23.50. Because this option agreement was entered into during the tender offer, it violated section 14(d)(7).

The evasion of section 14(d)(7) which Matsushita claims should have been permitted in this case is exactly that against which the Second Circuit in *Field* warned:

> Whether the acquisition of shares in a corporation is part of a tender offer for purposes of the Act [section 14(d)(7)] cannot be determined by rubber-stamping the label used by the acquirer. . . . Were the label used by the acquirer determinative, virtually all of the provisions of the Williams Act . . . could be evaded simply by an offeror's announcement that offers to purchase stock were private purchases." (*Id.*, 850 F.2d at 944.)

Just as the "private" stock option agreement which was entered into after the commencement of the tender offer and gave dissenting shareholders greater consideration for their stock in *Field* violated section 14(d)(7) and Rules 14d-10, the Wasserman

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F.2d at 945.) The *Field* court concluded that "all of the listed factors weigh in favor of treating the . . . acquisition . . . as a single tender offer." (*Id.*)

transaction, which was entered into ***after*** the commencement of Matsushita's formal tender offer and which gave greater consideration to Wasserman to the exclusion of the other shareholders, also violated section 14(d)(7) and Rule 14d-10.[19]

If the substantive analysis adopted by the Second Circuit and the court below were not utilized, an offeror could always thwart the purpose of section 14(d)(7) merely by entering into an ostensibly "private" agreement. If this were allowed, the remedial efficacy of section 14(d)(7) would effectively be eviscerated.[20]

What Matsushita is really asking this Court to do is to validate its attempt to escape the protective provisions of section 14(d)(7) and Rule 14d-10 merely by structuring a stock purchase entered into after the commencement of the formal tender offer as an ostensibly private transaction. The Ninth Circuit properly rejected Matsushita's claim that its obligations under the "best price / all holders" rules can so easily be avoided.[21]

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[19] Although Matsushita has attempted to limit the court's holding in *Field* to cases where there was a "payment" of higher consideration to certain shareholders "during the tender offer period," such attempt is unavailing. For purposes of section 14(d)(7), the timing of the *payment* of the higher consideration is totally irrelevant. Rather, it is the timing of the *offer* of higher consideration that is controlling: "Where any person varies the terms of a tender offer . . . by increasing the consideration ***offered*** to holders of such securities . . . " (Section 14(d)(7) (emphasis added).)

[20] The propriety of the Ninth Circuit's substantive analysis has also been expressly recognized by SEC:

> [T]he fact that . . . different consideration is offered to different holders of the same class of securities, does not mean that a tender offer has not be made under the Williams Act. ***Rather, if such a transaction is found to be a tender offer, then the tender offer would not have been made in compliance with the all-holders requirement.*** (SEC Release No. 34-22198, 1985 SEC LEXIS 1175, at *7 (July 1, 1985) (emphasis added.)

[21] *See also Wellman v. Dickinson*, 475 F.Supp. 783, 823-25 (S.D.N.Y.1979) *aff'd on other grounds*, 682 F.2d 355 (2d Cir. 1982), *cert. denied*, 460 U.S. 1069, (1983) (so-called "privately negotiated" purchases of shares constitute tender offer

B. The Ninth Circuit's Conclusion That the Wasserman Transaction Was Entered into after Matsushita's Formal Tender Offer Commenced Is Consistent with the Fourth Circuit's Decision in *Kahn*.

In support of its claim that the court below erroneously applied section 14(d)(7) and Rule 14d-10 to the Wasserman transaction, Matsushita represents to this Court that the parties "stipulated that the Wasserman transaction was entered into and consummated when no tender offer was pending." (Petition, page 22.) This representation is false. In truth, based on the facts to which Matsushita stipulated, it is clear that the Wasserman transaction was entered into ***after*** Matsushita's formal tender offer commenced.

Matsushita stipulated that its tender offer for MCA was publicly announced on the morning of November 26, 1990.[22] Pursuant to SEC Rule 14d-2, a tender offer is deemed to commence at 12:01 a.m. on the day the tender offer is publicly announced.[23] Thus,

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for purposes of Williams Act) and *Gerber v. Computer Associates International, Inc.*, 812 F.Supp. 361 (E.D.N.Y. 1993) (agreement entered into after the commencement of the tender offer between tender offeror and an officer and large shareholder of the target company, under the terms of which the shareholder agreed to sell his shares to the offeror for $15.75 per share and also agreed not to compete with the target or the offeror for a period of 5 years in return for the payment of $5,000,000, held to be subject to the proscriptions of section 14(d)(7) and Rule 14d-10 where agreement not to compete entered into after commencement of tender offer.)

[22]Consolidated CT: 354, paragraph 5.15.

[23]SEC Rule 14d-2(b)(ii) provides:

> (ii) Notwithstanding paragraph (b)(2)(i) of this section, section 14(d)(7) of the Act shall be deemed to apply to such tender offer from the date of such public announcement.

Matsushita's tender offer "commenced" at 12:01 a.m. on November 26, 1990 as a matter of law.[24]

Matsushita also stipulated that the Wasserman transaction was entered into at the earliest ***after*** 12:01 a.m. on November 26, 1990.[25] Thus, the Ninth Circuit properly recognized that, for purposes of section 14(d)(7) and Rule 14d-10, the Wasserman transaction was entered into after the commencement of Matsushita's tender offer. (App. page 16a, fn. 18.)

Contrary to Matsushita's contention, this holding is consistent with the Fourth Circuit's decision in *Kahn vs. Virginia Retirement System, supra.* In *Kahn*, the Fourth Circuit held that the Williams Act became operative when a purchaser makes a "tender offer" and that, under Rule 14d-2, the public announcement by a bidder constitutes the commencement of a tender offer, triggering the application of the Williams Act.[26] This holding is consistent with the Ninth Circuit's conclusion that the public announcement of the tender offer made by Matsushita and MCA on November 25, 1990 constituted the commencement of Matsushita's tender offer for purposes of Minton's section 14(d)(7) and Rule 14d-10 claims, not-

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[24] This analysis is consistent with the SEC's analysis:

> The Commission also has interpreted the Williams Act to require that the amount of consideration a bidder must pay a security holder in a tender offer conducted pursuant to Regulation 14D must be the highest consideration **offered to any security holder at any time during such tender offer**. [Footnote 10: "See Rule 14D-2(b)(2)(ii), 17 CFR 240.14-d(2)(b)(2)(ii), which provides that Section 14(d)(7) of the Exchange Act shall be deemed to apply to such tender offer from the date of the public announcement."] (Federal Securities Law Reports, SEC Release No. 6395, page 87,563.)

[25]Consolidated CT: 354, paragraphs 5.17 and 5.18.

[26]The Court stated:

> Rule 14d-2 states that the issuance of a "public announcement by a bidder ... with respect to a tender offer ... shall be deemed to constitute the commencement of a tender offer" and thus trigger the application of the Williams Act. (*Id.*, 13 F.2d at 114.)

withstanding the fact that the formal Offer to Purchase was sent out on November 30, 1990.[27]

IV. THE NINTH CIRCUIT'S PRECLUSION ANALYSIS IS CONSISTENT WITH THE FIRST AND THIRD CIRCUIT'S DECISIONS.

The court below refused to give preclusive effect to a collusive settlement agreement entered into in a dormant Delaware state court class action that purported to release the exclusively federal section 14(d)(7) and Rule 14d-10 claims in this case, where the facts underlying such claims were not and could not be litigated in the state court action, and where a litigated judgment would not have had any preclusive effect on such exclusively federal claims. (App. 28a-40a.)

Rather than briefing this issue at length, Minton joins in the brief of the Epstein Plaintiffs regarding the class action issues. Minton would point out, however, that, contrary to Matsushita's contention, this decision is consistent with the decisions of the First and Third Circuits in *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991) and *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553 (3d Cir. 1994), *cert. denied*, 115 S.Ct. 408 (1994).

In *Grimes*, the Delaware state court action, unlike the Delaware state court action filed in connection with Matsushita's tender offer for MCA, involved the same predicate facts that were the basis of the federal court action, *i.e.*, issues of nondisclosure by the defendants in connection with a merger agreement. In ruling that

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[27] As can be seen, the facts in *Kahn* are completely distinguishable from the facts in this case. Unlike the Stock Sale and Railroad Sale agreements in *Kahn*, the documents reflecting the Wasserman transaction and the Sheinberg Agreement were not executed before the commencement of the tender offer, but *after* the commencement of the tender offer. (*See also, Gerber v. Computer Assocs. Intl.*, *supra* at 365-366 (where there was a public announcement of a tender offer on August 16 and a formal Offer to Purchase on August 22, the tender offer commenced for purposes of section 14(d)(7) and Rule 14d-10 claims at the time of the public announcement, notwithstanding the fact that the formal Offer to Purchase was sent on August 22).)

the state court judgment incorporating the terms of the class action settlement was binding on the federal claims, the court in *Grimes* relied on the fact that the federal action involved claims "arising from the same nucleus of operative facts." (*Id.*, 17 F.3d at 1563.) This is the identical test that the Ninth Circuit adopted in this case.

Similarly, in *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29 (1st Cir. 1991), the First Circuit, citing *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982), applied "same nucleus of operative fact" test to a subsequent federal court action involving federal law claims that stemmed from the same operative facts as the state law claims and concluded that the state court release could serve as a bar to such federal claims. (*Id.*, 925 F.2d at 34.)

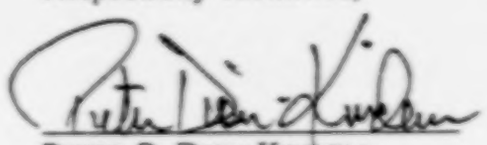
There is nothing inconsistent with the decision of the court below and the decisions of the First and Third Circuits, and Matsushita has cited no cases in which the application of the Ninth Circuit's preclusion analysis would result in a different decision.

CONCLUSION

The decision of the court of appeals is consistent with the jurisprudence of this Court and with the decisions of every Circuit Court that has addressed similar issues. Matsushita's request that this Court expend its valuable time to review an interlocutory ruling on unique transactions structured with the intent of evading the "best price" securities laws for the benefit of two wealthy individuals should be denied.

May 19, 1995

Respectfully submitted,



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